Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MSW INVESTMENTS, A TEXAS JOINT VENTURE,

Petitioner,

v.

CHEVRON USA, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUE PRESENTED

Recognition of judicially created bases for vacatur of commercial arbitration decisions varies greatly among the federal courts. In this case, the Fifth Circuit Court of Appeals refused to recognize any judicially created basis for vacatur. In other cases, the Fifth Circuit has recognized the "essence of the contract" test.

1. Did the court of appeals err in refusing to review and vacate an arbitrator's decision under either the essence of the contract test or the manifest disregard standard?

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PETITION FOR A WRIT OF CERTIORARI

MSW Investments, a Texas Joint Venture, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS, ORDERS, AND JUDGMENTS BELOW

The opinion of the court of appeals is unreported. It is included at pages A-1 through A-3.

The judgment of the district court is included at pages A-4 through A-6.

The district court's memorandum opinion is unreported. It is included at pages A-7 through A-10.

JURISDICTION

The decision of the court of appeals was rendered March 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THE CASE

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made had not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 10.

STATEMENT OF THE CASE

A. Facts

MSW secured a right of first refusal in a compromise settlement agreement between MSW and Chevron. (R. 493). In June of 1995, MSW attempted to exercise the right of first refusal on a tract of land located at the corner of Alpha Road and the North Dallas Tollway in Dallas, Texas. MSW exercised the right of first refusal in compliance with the terms of the contract. (R. 508). Chevron, however, refused to honor MSW's exercise and notified MSW that it would sell to a third-party buyer. (R. 513).

B. Proceedings Below

MSW filed suit in state court seeking specific performance and damages for Chevron's breach of the agreement. (R. 516). MSW also filed a lis pendens. (R. 521). Chevron counterclaimed for slander of title, tortious interference, and a declaratory judgment. Chevron removed the case to federal court pursuant to 28 U.S.C. § 1332 (R. 1) and requested that the case be submitted to arbitration (R. 37). The district court ordered that the case be arbitrated. (R. 415).

The arbitrator decided each party should take nothing. (R. 505). The arbitrator incorrectly decided MSW failed to properly exercise the right of first refusal. (R. 505). MSW moved the district court to vacate the decision. (R. 485). The district court refused (R. 714) and rendered judgment for Chevron. (R. 724).

Pursuant to 28 U.S.C. § 1291, MSW appealed to the Fifth Circuit U.S. Court of Appeals. The court of appeals

refused to apply either of two judicially created bases for vacatur of an arbitration of award and affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT

A. The controlling issue is whether the statutory bases for vacatur in the Federal Arbitration Act are exclusive.

The overarching issue in this case is whether it is appropriate to vacate a commercial arbitration decision under a judicially created basis for vacatur or whether the grounds for vacatur set forth in 9 U.S.C. § 10 are exclusive. This Court has not definitively addressed the issue. *See* Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 261-63 (1993) [hereinafter Galbraith]. Federal appellate courts are in a state of confusion over this issue. *See generally* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) [hereinafter Hayford].

B. There is widespread confusion among the courts of appeals concerning vacatur of arbitration awards under judicially created bases.

MSW sought vacation of the arbitration award under either of two judicially created bases for vacatur of

arbitration awards: 1) the "essence of the contract" test; and 2) the "manifest disregard" standard.[1]

The essence test originated with this Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). It was most recently articulated by the Court in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

The manifest disregard standard originated with this Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Court continues to recognize the manifest disregard standard. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

1. The essence test applies in commercial arbitration cases.

This Court has applied the essence test in labor disputes. *United Steelworkers*, 363 U.S. at 597; *Misco*, 484 U.S. at 36. Courts such as the Fifth Circuit have applied the essence test in the context of commercial disputes. *See, e.g., Anderman/Smith Operating Co. v. Tennessee Gas Pipeline*

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[1] The essence test and the manifest disregard test are closely related. Both are non-statutory bases for judicial review of an arbitration award created by the Supreme Court, and the difference between the two is often more a matter of label than substance. *See Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990); *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1459 n. 5 (11th Cir. 1997). Moreover, some courts take the position that these are actually *statutory* bases for review of an arbitrator's decision. *See* Galbraith, *supra*, at 257-58.

Co., 918 F.2d 1215, 1218 (5th Cir. 1990), *cert. denied*, 501 U.S. 1206 (1991); *Executone Information Systems, Inc. v. Davis*, 26 F.3d 1314, 1324 (5th Cir. 1994).

a. An arbitrator's decision must be grounded in the essence of the contract between the parties.

Under the essence test, to be valid, an arbitrator's decision must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the agreement governing the relationship between the parties. *See Anderman/Smith*, 918 F.2d at 1218. The decision must, in some logical way, be derived from the wording or purpose of the contract. *See Executone Information Systems*, 26 F.3d at 1324. Stated more succinctly, the arbitrator may not ignore the plain language of the contract. *See Misco*, 484 U.S. at 38.

b. The essence test is applied in some circuits, but not uniformly.

In various forms, the essence test has also been recognized in commercial arbitration cases by the Tenth Circuit,[2] the Eighth Circuit,[3] the Second

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[2] *See, e.g., Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631 (10th Cir. 1988); *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1022 (10th Cir. 1993). In *Jenkins*, the court of appeals took the position that the essence test is a basis for review under 9 U.S.C. § 10. *Jenkins*, 847 F.2d at 634-35. But in *Seymour*, the court's explanation of the essence test contains no reference to 9 U.S.C. § 10. *Seymour*, 988 F.2d at 1022.

[3] *See Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988).

Circuit,[4] the Ninth Circuit,[5] and the Sixth Circuit.[6] On the other hand, the Fourth Circuit refuses to recognize any non-statutory ground for vacatur of an arbitration award. *See Remmey v. PaineWebber, Inc.*, 32 F.3d 143 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 903 (1995); *see also* Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds For Judicial Review of Commercial Arbitration Awards*, 51-OCT DISP. RESOL. J. 22, 24 (1996). And the Eleventh Circuit is under the impression that the Fifth Circuit falls into the same camp as the Fourth Circuit. *See Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1460 (11th Cir. 1997).

c. A conflict exists within the Fifth Circuit concerning the essence test.

Even more striking than the variety of approaches among the circuits is the variety of approaches within the Fifth Circuit. In some commercial arbitration cases, the Fifth Circuit recognizes the essence test. *See Anderman/Smith Operating Co.*, 918 F.2d at 1218; *Executone*

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[4] *See John T. Brady & Co. v. Form-Eze Systems, Inc.*, 623 F.2d 261, 264 (2d Cir.), *cert. denied*, 449 U.S. 1062 (1980) (courts bound by arbitrator's interpretation of contract so long as it is "barely colorable").

[5] *Employers Ins. v. Nat'l Union Fire Ins. Co.*, 933 F.2d 1481, 1486 (9th Cir. 1991) (award must represent a "plausible" interpretation of the contract).

[6] *See Federated Dept. Stores, Inc. v. J.V.B. Industries*, 894 F.2d 862, 866 (6th Cir. 1990) (discussing both essence of contract test and manifest disregard standard).

Information Systems, 26 F.3d at 1324.[7] While in other cases, such as this one, the Fifth Circuit apparently refuses to recognize any judicially created basis for review of an arbitration award. *See also McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 (5th Cir. 1993); *R.M. Perez & Associates v. Welch*, 960 F.2d 534, 539-40 (5th Cir. 1992); *Forsythe International, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1020 (5th Cir. 1990).

This inconsistency has led one commentator to observe, "Today it is impossible to divine the true state of the law in the Fifth, Sixth, Seventh, or Ninth Circuits." Hayford, *supra*, at 840; *see also* Galbraith, *supra*, at 261-63.

2. The Manifest Disregard Standard.

MSW also sought vacation of the arbitrator's decision under the "manifest disregard of the law" standard originating in *Wilko v. Swan*, 346 U.S. 427, 436, 437 (1953). This Court recently indicated that it continues to recognize this standard. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

a. The Fifth Circuit does not apply the manifest disregard standard.

The court of appeals, however, refused to analyze the arbitrator's decision under the manifest disregard standard. The court of appeals stated (incorrectly) that it does

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[7] The court of appeals did not even attempt to distinguish *Anderman/Smith* or *Executone*.

not recognize *any* basis for vacating an arbitrator's decision other than those specifically stated in 9 U.S.C. § 10.[8] According to a recent Eleventh Circuit decision, the Fifth is the only circuit refusing to recognize the manifest disregard standard. *See Montes*, 128 F.3d at 1460.

b. Other circuits apply various formulations of the manifest disregard standard.

Among the circuits applying the manifest disregard standard, there are various formulations. Perhaps the most prominent formulation is set forth in *Merrill Lynch Pierce Fenner & Smith v. Bobker*, 808 F.2d 930 (2d Cir. 1986).

Under the *Bobker* formulation, a court may vacate an arbitrator's award if the arbitrator's error is obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. The arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. *Id.* at 933.

The *Bobker* formulation, however, is not universally accepted by courts recognizing the manifest disregard standard. *See Robbins v. Day*, 954 F.2d 679, 683-84 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992); *see also* Galbraith, *supra*, at 253-54. "There is inconsistency among courts throughout the United States on the degree of the showing in the record required to satisfy the manifest disregard of the law standard." *Robbins*, 954 F.2d at 683.

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[8] Plainly, the Fifth Circuit has recognized the essence of the contract test. *See Anderman/Smith Operating Co.*, 918 F.2d at 1218; *Executone Information Systems*, 26 F.3d at 1324.

3. This Court Should Resolve the Confusion.

This Court should address the confusion surrounding judicially created grounds for vacatur of commercial arbitration awards. *See* Hayford, *supra*, at 840-41; Galbraith, *supra*, at 261-63. Allowing the confusion to persist will "leave the law of vacatur in a constant and accelerating state of flux," Hayford, *supra*, at 840-41.

a. There is both intra-circuit and inter-circuit conflict.

As indicated, conflicts exist both within the Fifth Circuit and among the circuits concerning the availability and application of judicially created standards for review of commercial arbitration decisions. This Court has previously recognized that a combination of intra-circuit and inter-circuit conflicts warrants the granting of certiorari. *See Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as having intra-circuit conflict).

b. Enhanced judicial review is an important safeguard.

The commentators cited above favor elimination of judicially created grounds for review of an arbitration award. Others, however, disagree.

Courts should have the ability to vacate an arbitrator's decision when it is based on a manifest disregard of the law or is not rationally inferable from the letter or purpose of the controlling agreement. This Court has

recognized the need for court-created appurtenances to the narrow grounds set forth in the Federal Arbitration Act. *Wilko*, 346 U.S. at 436-37; *Misco*, 484 U.S. at 36. The Eleventh Circuit, initially reluctant to adopt the manifest disregard standard, has now recognized its importance as a judicial safeguard. *Montes*, 128 F.3d at 1461-62.

Other commentators recognize the need for judicial review of arbitration awards beyond that available under 9 U.S.C. § 10. *See generally* Anthony J. Jacob, *Expanding Judicial Review to Encourage Employers and Employees to Enter the Arbitration Arena*, 30 J. MARSHALL L. REV. 1099 (1997); Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 HARV. WOMEN'S L.J. 17 (1994). Judicial review provides a safeguard against the flaws inherent in the arbitration process. *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 55 (1987); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985); Heinrich Kronstein, *Arbitration Is Power*, 38 N.Y.U. L. REV. 661, 661-62 (1963).

"Many friends of arbitration believe that expanded review would improve the process." Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 121 (1997) [hereinafter Davis]. Courts should vacate "outrageous" decisions because the enforcement of such decisions shakes confidence in the arbitral process and therefore undermines arbitration policy. *Id.*, *citing*, Jessica T. Martin, *Advanced Micro Devices v. Intel Corp. and Judicial Review of Commercial Arbitration Awards: When Does a Remedy Exceed*

Arbitral Power?, 46 HASTINGS L.J. 1907, 1938 (1995).[9] In simple terms, judicial review protects the parties from unfair awards. *See* Davis, *supra*, at 121.

C. The Arbitrator's Decision In This Case Should Be Vacated – It Is Not Rationally Inferable From The Essence of the Contract.

The arbitration award in this case can rightly be considered to have been fundamentally contrary to the contract at issue and the applicable law. The arbitrator ignored the plain language of the contract and refused to apply the law when he decided MSW failed to properly exercise the right of first refusal.

The settlement agreement between MSW and Chevron governs how the right of first refusal was to be exercised. The language is unambiguous as to what is required:

> "Chevron hereby grants to MSW (and not to MSW partners individually) a right of first refusal to repurchase the property upon the following terms:
>
> (a) Chevron shall inform MSW within 30 days of any bona fide offer to purchase the property that Chevron desires to accept (the "Third Party Offer");
>
> * * *

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[9] This commentator generally favors restricting or eliminating judicially created bases for review of an arbitrator's decision.

> **(d) MSW shall notify Chevron in writing of its intention to either purchase the property or not within 30 days after MSW's receipt of the offer;** and
>
> * * *
>
> If MSW does not give notice of its intention to purchase the property within a 30-day period as provided in (d) above, Chevron may sell the property to the named party in the Third Party Offer.

(R. 493) (emphasis added). Under provision (d), all that was required of MSW was to: 1) notify Chevron; 2) in writing; 3) of its intention to purchase the property; and 4) do so within 30 days after receipt of notice of a third party offer. As the Fifth Circuit has explained, an optionee like MSW is required to manifest its acceptance *"according to the terms or conditions of the option." West Texas Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1565 (5th Cir. 1990) (emphasis added).

1. MSW exercised its right of first refusal in accordance with the agreement.

The documents presented to the arbitrator confirm MSW exercised the right of first refusal in accordance with the agreement. During the arbitration, the following facts were established through documentary proof:

1. Chevron sent notification to MSW Managing Partner Larry Steinberg on May 25, 1995 (received by MSW on May 31, 1995) that MSW had thirty (30) days from receipt to notify Chevron whether MSW intended to

exercise the right of first refusal. (Chevron's letter was mistakenly dated May 4.) (R. 507).

2. By letter dated June 23, 1995, MSW Managing Partner Larry Steinberg notified Chevron of MSW's intention to exercise the right of first refusal. (R. 508).

This documentary evidence confirmed that MSW properly exercised its right of first refusal.

Once MSW's managing partner, Larry Steinberg, received Chevron's letter advising there was a third party offer to buy the property, MSW was required to "notify Chevron in writing of its intention to either purchase the property or not within 30 days after MSW's receipt of the offer." (R. 493). Larry Steinberg timely advised Chevron in writing that MSW intended to exercise its right of first refusal. (R. 508). Mr. Steinberg's letter was an unqualified, absolute, unconditional, unequivocal, unambiguous, and positive exercise of the option.

MSW presented the arbitrator with cases confirming that an optionee need only exercise the option *according to the express terms of the contract*. (R. 524). All that is required of an optionee is that he notify the optionor of his decision to exercise the option. *Odum v. Sims*, 609 S.W.2d 881, 882 (Tex. Civ. App. – San Antonio 1980, no writ). MSW so notified Chevron. (R. 508). When an option is exercised in accordance with the terms of the contract, it becomes a binding bilateral contract. *Western Federal Savings and Loan Association v. Atkinson Financial Corp.*, 747 S.W.2d 456, 461 (Tex. App. – Fort Worth 1988, writ ref'd n.r.e.).

The Texas cases cited to the arbitrator represent the prevailing view on the exercise of a right of first refusal to purchase real property. Anything consistent with the contract that amounts to manifestation of the optionee's intention to accept is sufficient. 77 AM. JUR. 2d *Vendor and Purchaser* § 48 (1997).

Given these facts, the controlling law, and the express terms of the contract, there is but one conclusion: the arbitrator's refusal to find that MSW properly exercised the right of first refusal is not logically drawn from the wording and purpose of the contract and is based on a manifest disregard of the law. An arbitrator may not disregard unambiguous contract provisions. *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1987).

2. Chevron improperly attempted to condition exercise of the right of first refusal on proof of the managing partner's authority.

Chevron contends MSW did not properly exercise the right of first refusal because MSW failed to prove to Chevron that its managing partner, Larry Steinberg, had authority to exercise the right of first refusal on behalf of MSW. *But nothing in the agreement required MSW to provide Chevron such proof.* There is no such condition precedent in the agreement. If Chevron wanted such a condition precedent, it should have included a "proof of authority" provision in the agreement.

The right of first refusal provision is unambiguous – all that MSW was required to do was notify Chevron

within 30 days of its desire to exercise its right. Unambiguous contracts are enforced as written. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). When MSW's managing partner responded to Chevron's letter with a timely letter to Chevron advising that it intended to exercise that right, MSW satisfied the express terms of the agreement and properly exercised its right of first refusal.

In the reverse situation where there are multiple owners of property subject to a right of first refusal, notice to one such owner is sufficient unless the right of first refusal agreement requires notice to be given all owners. 77 AM. JUR. 2d *Vendor and Purchaser* § 47 (1997). Similarly, an optionee properly exercises a right of first refusal by giving notice to a "managing heir" holding himself out, with the knowledge and consent of the other heirs, as their agent. *Id.* Here, in the converse situation, MSW properly exercised the right of first refusal by having its managing partner send written notice to Chevron.

It was disingenuous for Chevron to question Mr. Steinberg's authority. After all, Chevron sent the letter notifying MSW of a third party offer to . . . *Mr. Steinberg*. And, in keeping with the express terms of the agreement, Chevron's initial letter to Mr. Steinberg did not request proof of Mr. Steinberg's authority to exercise the right of first refusal on behalf of MSW.

Chevron did not concoct its extracontractual "proof of authority" requirement until after MSW had already exercised its right of first refusal. (R. 510). By then, it was too late because MSW had already invoked its right to buy the property and a binding bilateral contract was established. *Western Federal Savings and Loan Association v.*

Atkinson Financial Corp., 747 S.W.2d 456, 461 (Tex. App. – Fort Worth 1988, writ ref'd n.r.e.).

Chevron's attempt to question Mr. Steinberg's authority is nothing more than a red herring. The documentary evidence presented to the arbitrator confirmed Mr. Steinberg had authority. MSW could acquire property with the assent of 66½% of the votes of the joint venturers. (R. 542). MSW presented the arbitrator with copies of earnest money checks from Larry Steinberg and each of his partners.[10] (R. 546-50). Moreover, MSW wired the earnest money to the title company.

These checks proved the other joint venturers consented to the exercise of the right of first refusal. Furthermore, it was clear Mr. Steinberg himself consented since he prepared, signed, and sent the letter exercising the right of first refusal.

Unless the right of first refusal agreement, by its express terms, required MSW to prove to Chevron that its managing partner had authority to act on behalf of the joint venture, the arbitrator's decision is indefensible. The agreement contained no such requirement. Only by ignoring the wording of the contract and the controlling law could the arbitrator decide the dispute against MSW.

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[10] Joel Steinberg's check is dated July 3, 1995, which is after the June 31 deadline for exercising the right of first refusal. Joel Steinberg, however, had only a 12.14% voting interest in the joint venture, so even without his check, the percentages still add up to 87.86%.

CONCLUSION

Petitioner respectfully submits this Court should resolve the confusion over the proper grounds for vacating an arbitrator's decision. The Court could do so by holding that whenever a commercial arbitration decision fails to draw its essence from the agreement of the parties or is based on a manifest disregard of the law, it *must* be vacated.

Here, the arbitrator's decision is not rationally inferable from the contract governing MSW's right of first refusal, and it is based upon a manifest disregard of the law.

The petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10659
Summary Calendar

MSW INVESTMENTS, A Texas
Joint Venure,

Plaintiff-Appellant,

versus

CHEVRON U.S.A., INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas

(3:95-CV-1537)

(Filed March 27, 1998)

Before POLITZ, Chief Judge, JONES and DeMOSS, Circuit Judges.

PER CURIAM:*

MSW Investments appeals the district court's denial of its motion to vacate an arbitration award in a dispute about its right of first refusal on property owned by Chevron USA, Inc. MSW contends that the arbitrator's

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

decision is not rationally inferable from the contract between it and Chevron and is based on a manifest disregard of the law. Chevron responds that the Arbitration Act[2] provides the sole basis for vacatur of an arbitration award. For the reasons assigned, we affirm.

Sections 10 and 11 of the Federal Arbitration Act provide the only grounds on which a reviewing court may vacate an arbitration award.[3] An award may not be reconsidered based on alleged errors of fact or law or misinterpretation of the contract.[4] We have expressly "declined to adopt 'manifest disregard,' or any other standard, as an addendum to [the Act]."[5] Thus, an arbitration award may not be vacated unless: "(1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers."[6]

MSW's contention that the arbitration award is not rationally inferable from the contract and is based on a manifest disregard of the law does not comport with any of the grounds for attacking an award set forth in the

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[2] 9 U.S.C. § 1 *et seq.*

[3] **R.M. Perez & Associates, Inc. v. Welch,** 960 F.2d 534 (5th Cir. 1992).

[4] **Exxon Corp. v. Baton Rouge Oil and Chemical Workers Union,** 77 F.3d 850 (5th Cir. 1996).

[5] **McIlroy v. PainWebber,** [sic] **Inc.,** 989 F.2d 817, 820 n.2 (5th Cir. 1993).

[6] **Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas,** 915 F.2d 1017, 1020 (5th Cir. 1990); 9 U.S.C. § 10.

Arbitration Act. Consequently, MSW is not entitled to the relief it seeks. We affirm the confirmation of the arbitrator's award.

The judgment appealed is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MSW INVESTMENTS, a TEXAS JOINT VENTURE, Plaintiff,	§	Civil Action Case Number: 3:95-CV-1537-H
v.	§	
CHEVRON U.S.A. INC., Defendant and Counter-Plaintiff.	§	

FINAL JUDGMENT

(Filed May 19, 1997)
(Entered on Docket 5-19-97)

Pursuant to the terms of an arbitration agreement, the above-styled cause was ordered to arbitration by this Court. The dispute concerned whether MSW Investments ("MSW") properly exercised its right of first refusal on a parcel of property located at the Northeast corner of Alpha Road and the Dallas North Tollway (the "Property"). After a full hearing, the Arbitrator issued his Award on February 21, 1997. The Award, in part, denied MSW any monetary relief, but held that MSW continued to hold a right of first refusal on the property under the 1993 Settlement and Compromise Agreement. Chevron U.S.A., Inc. ("Chevron") moved to confirm the Award and cancel the associated lis pendens on the Property, and MSW moved to vacate the Award.

After considering the pleadings, evidence and applicable law, this Court denied the Motion to Vacate, confirmed the Award, and cancelled the lis pendens by Order

of May 7, 1997. This Court holds that MSW failed to properly exercise its right of first refusal with respect to the Property, and that Chevron's refusal to sell the Property to MSW was justified. Chevron conducted itself in a commercially reasonable manner, and MSW's conduct was not commercially reasonable. Chevron has title to the Property free and clear of any claim previously asserted by MSW. The foregoing notwithstanding, MSW retains the right of first refusal pursuant to the Compromise and Settlement Agreement of 1993.

Therefore, it is

1. ORDERED, ADJUDGED and DECREED that MSW's Motion to Vacate the Award is denied; It is further,

2. ORDERED, ADJUDGED and DECREED that Chevron's Motion to Confirm the Arbitration Award of February 21, 1997, as clarified by the arbitrator's letter dated March 6, 1997, is granted; It is further

3. ORDERED, ADJUDGED and DECREED that MSW take nothing on all its claims against Chevron. It is further

4. ORDERED, ADJUDGED and DECREED that MSW failed to properly exercise its right of first refusal with respect to the Property, and that Chevron's refusal to sell to MSW was justified. It is further

5. ORDERED, ADJUDGED and DECREED that Chevron take nothing on its counter-claims of slander of tittle [sic] and tortious interference. It is further

6. ORDERED, ADJUDGED and DECREED that the lis pendens on the Property is cancelled, and MSW shall

file the appropriate filings in the Dallas County records and to provide the Court proof of such filing by May 30, 1997; it is further

5. ORDERED, ADJUDGED and DECREED that each party is to bear its own attorney's fees and costs of court.

This is a Final Judgment.

Signed this 19 day of May, 1997.

/s/ Barefoot Sanders
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MSW INVESTMENTS, a Texas Joint Venture Plaintiff, v. CHEVRON U.S.A., INC. Defendant.	*	Civil No. 3:95-CV-1537-H (Filed May 7, 1997)

ORDER

Before the Court is Defendant Chevron's Motion for Confirmation of the Arbitration Award, filed March 10, 1997, and Plaintiff MSW's Motion to Vacate the Arbitration Award, filed March 21, 1997. Chevron has also submitted a Request for Costs Under Rule 68, filed March 11, 1997. Response and reply briefs have been filed.

This case involves a parcel of land located in Dallas at the corner of Alpha Road and the Dallas North Tollway (the "subject property"). The subject property is owned by Chevron. By virtue of a 1993 agreement, MSW held a right of first refusal on the property. Thereafter, Chevron received an offer from a third party, Sojourn, Inc., to buy the subject property. This lawsuit arose out of MSW's attempt to exercise its right of first refusal. In connection with the litigation, MSW filed a lis pendens as to the subject property in the Dallas County Land records.

I. Motion to Vacate

MSW seeks vacatur of the arbitration award on the basis that the arbitrator manifestly disregarded the law applicable to the case. The Fifth Circuit has declined to recognize "manifest disregard of law" as a basis for vacating arbitration awards, holding that the Federal Arbitration Act provides the exclusive grounds for vacatur. *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 & n.2 (5th Cir. 1993); *R.M. Perez & Assocs. Inc. v. Welch*, 960 F.2d 534 (5th Cir. 1992). Accordingly, MSW's Motion to Vacate is **DENIED.**

II. Motion to Confirm

Chevron's Motion seeks confirmation of the arbitration award, cancellation of the lis pendens filed by MSW, and entry of final judgment. Under Section 9 of the Federal Arbitration Act, any party may apply for an order confirming an arbitration award within one year thereof. 9 U.S.C. § 9. Confirmation under Section 9 is intended to be summary. MSW's sole rationale for resisting confirmation has already been rejected above. Therefore, the Court hereby **CONFIRMS** the arbitrator's award of February 21, 1997, as clarified by the arbitrator's letter dated March 6, 1997.

The issue of title and MSW's claim having been resolved by the arbitrator, the lis pendens on the subject property is hereby **CANCELED.** MSW is **DIRECTED** forthwith to make appropriate filings in the Dallas County records and to provide the Court proof of such filing by noon, Tuesday, **May 13, 1997.**

Chevron is **DIRECTED** to prepare a judgment, approved by MSW as to form, and submit it to the Court for signature by noon, Tuesday **May 13, 1997**.

III. Rule 68 Request for Costs

Chevron has also requested an award of costs pursuant to Rule 68. On May 20, 1996, Chevron served an offer of judgment on MSW which would have allowed MSW to purchase the subject property for $1.6 million.

The Court notes that, under the authority of the governing arbitration rules, the arbitrator determined that each party should bear its own costs. Chevron argues that the arbitrator's ruling on costs does not affect its right to recover costs under Rule 68.

In considering a Rule 68 request, the Court must compare Chevron's offer of judgment to the judgment provided for in the arbitrator's award to determine whether the latter is "not more favorable" than the former. The Fifth Circuit has stated that "Rule 68 is a mandatory rule designed to operate automatically by a comparison of two clearly defined figures." *Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 870 (5th Cir. 1986) (refusing to apportion a joint offer of judgment when plaintiff later obtained final judgment against single, non-settling defendant). Here, Chevron's offer of Judgment would have allowed MSW to buy the subject property in May, 1996 for $1.6 million under specified terms. Under the arbitrator's award, the primary relief granted MSW is a continuing right of first refusal on the property in the event of future sale.

The essentially equitable decision by the arbitrator is not amenable to easy monetary valuation. This case does not present the mechanical comparison two [sic] clearly defined figures contemplated by Rule 68. Accordingly, Chevron's Request for Costs under Rule 68 is **DENIED.**

The Clerk is directed to fax a copy of this Order to counsel for both sides.

SO ORDERED.

DATED: May 7, 1997.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS

Supreme Court, U.S.
FILED
JUL 13 1998

No. 97-2007

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MSW INVESTMENTS, A TEXAS JOINT VENTURE,
Petitioner,
v.
CHEVRON U.S.A. INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals properly affirm the award of an arbitrator who ruled that Petitioner had failed to properly exercise a right of first refusal it possessed in property owned by Respondent and that Respondent's refusal to sell the property was justified?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6, Respondent Chevron U.S.A. Inc. hereby lists the corporate entities related to it. The following is the parent company of Respondent Chevron U.S.A. Inc.: Chevron Corporation. The following are the non wholly-owned subsidiaries of Chevron U.S.A. Inc.: Chevron Credit Bank, N.A.; Chevron do Brasil Ltda.; Chevron Oil Congo S.A.R.L.; Compania Minera Chevron Dominicana, S.A.; Felix Oil Company; Midstream Barge Company, L.L.C.; NGC Corporation; Pembroke Capital Company Inc.; and TBA Supply Company.

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CASES CITED	Page
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Kelley v. Michaels, 59 F.3d 1050 (10th Cir. 1995)	10
LaFarge Conseils et Études, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986)	7
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Montes v. Shearson Lehman Bros., 128 F.3d 1456 (11th Cir. 1997)	6, 10
Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264 (7th Cir. 1988)	7

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Remmey v. PaineWebber, Inc., 32 F.3d 143 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995)	5, 8
Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union, 973 F.2d 276 (4th Cir. 1992), *cert. denied*, 513 U.S. 1112 (1995)	8
R.M. Perez & Assocs. v. Welch, 960 F.2d 534 (5th Cir. 1992)	7
Robbins v. Day, 954 F.2d 679 (11th Cir.), *cert. denied sub nom. Robbins v. PaineWebber, Inc.*, 506 U.S. 870 (1992)	8, 10
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Service Employees Int'l Union, AFL-CIO, CLC v. Local 1199 N.E., SEIU, AFL-CIO, CLC, 70 F.3d 647 (1st Cir. 1995)	11
Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987)	3, 4
Southland Corp. v. Keating, 465 U.S. 1 (1984)	3
Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125 (3d Cir. 1972)	10
Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176 (11th Cir. 1981)	5
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United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)	9
Wilko v. Swan, 346 U.S. 427 (1953)	4, 5, 9

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OTHER AUTHORITIES CITED

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Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241 (1993) 6, 9

Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759 11

Phillip C. Essig, *U.S. Supreme Court Tackles Arbitration Issues*, N.Y.L.J., Feb. 14, 1995, at 1 4

Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, DISPUTE RESOLUTION J., Oct. 1996, at 22 9

Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-2007

MSW INVESTMENTS, A TEXAS JOINT VENTURE,
Petitioner,

v.

CHEVRON U.S.A. INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Underlying Facts

Pursuant to the terms of a 1993 Compromise and Settlement Agreement [the "Agreement"] (R. 042) between Petitioner MSW Investments and Respondent Chevron U.S.A. Inc. in unrelated litigation, Chevron purchased an approximately one-acre parcel of land in Dallas, Texas [the "Property"], and granted "to MSW (and not to MSW's partners individually) a right of first refusal to repurchase the property" in the event of future sale by Chevron, on the same terms and conditions as offered by a potential buyer and accepted by Chevron. (R. 043). After a third party presented a written offer to Chevron to purchase the Property which Chevron found accept-

able, Chevron advised MSW of the third-party offer pursuant to the terms of the Agreement (R. 507), and forwarded a copy of that third-party offer. (R. 457). Lawrence Steinberg, purporting to act on behalf of MSW as managing partner, attempted to exercise the right of first refusal (R. 508), but without submitting documentation that he had the authority to so bind MSW or that MSW stil existed. (R. 510; S.R.[1] 0027, 0029, 0031). The documents forwarded by Steinberg in response revealed that he, in fact, was not authorized to bind the partnership, and they also called into question whether MSW still existed. Steinberg refused to provide the requested proof of authority and other requested documentation in response to further requests, even though Chevron on multiple occasions extended the time during which MSW could exercise the right of first refusal. (S.R. 0027, 0029, 0031). Instead, MSW filed a lawsuit against Chevron in Texas state court, and filed a lis pendens on the Property. (R. 008, 014).

B. Proceedings Below

Following removal by Chevron of MSW's action against it to the United States District Court for the Northern District of Texas on July 27, 1995, that court, on July 24, 1996, ordered the parties to arbitrate their disputes before an arbitrator mutually selected by the parties. On February 21, 1997, the arbitrator entered an award that concluded, in pertinent part, that MSW had not properly exercised the right of first refusal it possessed relating to the Property and that Chevron was justified in refusing to sell the Property. (R. 446).[2] Following the filing of a

[1] "S.R." references are to the Supplemental Record which Chevron filed in the United States Court of Appeals for the Fifth Circuit.

[2] In terms of measuring the extent of the controversy between the parties, it bears mention that the arbitrator concluded that the right of first refusal was *not* extinguished as a result of the improperly attempted exercise. Rather, the right retained its vitality in the event Chevron should subsequently receive an offer on the property which it desired to accept.

Motion to Confirm by Chevron (R. 440) and a Motion to Vacate by MSW (R. 485), the district court confirmed the award, and entered a Judgment on May 19, 1987. (R. 724). MSW appealed to the Fifth Circuit, arguing in its November 18, 1997 brief that the arbitral award should be vacated on the basis of the "essence" test and that the arbitrator manifestly disregarded the law. Finding such standards impermissible on a motion to vacate, the Fifth Circuit affirmed in a brief per curiam opinion.

REASONS FOR DENYING THE WRIT

The arbitrator's decision here under review was a workaday interpretation of a contract between MSW and Chevron. There is, moreover, no substantive disagreement among the courts of appeals as to when they may vacate an arbitrator's award. Virtually all of the assertedy conflicting language cited by Petitioner is dictum. The results reached by the courts of appeals are all in harmony, and neither the court below nor any other court decision cited in the Petition, has departed from the standard of review set by the Federal Arbitration Act itself. There is, therefore, nothing deserving this Court's attention.

I. THE FEDERAL ARBITRATION ACT ESTABLISHES A FEDERAL POLICY FAVORING ARBITRATION AND PROVIDING FOR EXTREMELY LIMITED JUDICIAL REVIEW OF ARBITRATORS' DECISIONS.

The Federal Arbitration Act established a "federal policy favoring arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), and "was intended to 'revers[e] centuries of judicial hostility to arbitration agreements,'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974));

Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 24 (1991). This Court has instructed that the judiciary must respect parties' conscious choice for the ease and convenience of arbitration over formal, full-scale, costly litigation. In *Mitsuibishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985), for example, this Court observed that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alterantive means of dispute resolution." *See also Gilmer*, 500 U.S. at 34 n.5. And the Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), has been characterized as "an unequivocal rejection of the belief that a judicial forum is needed to protect the substantive rights of parties and a clear statement that judicial hostility to arbitration would no longer be countenanced." Phillip C. Essig, *U.S. Supreme Court Tackles Arbitration Issues*, N.Y.L.J., Feb. 14, 1995, at 1; *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) ("To the extent that *Wilko* [*v. Swan*, 346 U.S. 427 (1953)] rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.").[3]

The primary concern of Congress in passing the Federal Arbitration Act "was to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also Shearson/American Express, Inc.*, 482 U.S. at 225-26. Congress further recognized the additional potential benefit

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[3] In view of this criticism of *Wilko*, the Petitioner misplaces its extensive reliance on that case as the purported source of authorization of broad judicial review. See Petition, at 5, 8.

to parties of resolving disputes quickly and more cheaply. *Dean Witter Reynolds Inc.*, 470 U.S. at 221; *Alberto-Culver Co.*, 417 U.S. at 510-11; *Wilko v. Swan*, 346 U.S. 427, 431, 438 (1953).[4] By freely agreeing to arbitrate potential claims, parties "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.*, 473 U.S. at 628. One consequence of that decision is that the parties to an arbitration agreement have consented to accept the facts and the law as the arbitrator or arbitrators find them; like the courts, the parties are equally bound to respect those arbitral determinations. Were parties guaranteed significant substantive judicial review upon receipt of an unfavorable arbitral award, much of the FAA's supporting logic would be lost. *Misco*, 484 U.S. at 38. "[A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993); *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).

To effectuate this policy, courts must accept arbitrators' findings of fact and conclusions of law in nearly all cases. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987); *see also, e.g., Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir.), *cert. denied*, 512 U.S. 1205 (1994); *Board of County Comm'rs v. L. Robert Kimball & Assocs.*, 860 F.2d 683, 685 (6th Cir. 1988), *cert. denied*, 494 U.S. 1030 (1990). "[C]ourts are not authorized to reconsider the merits of an award even though the parties

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[4] There are additional reasons for a uniform national policy favoring arbitration. *E.g., Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1170-80 (11th Cir. 1981) (reduction in congestion in courts to the benefit of other litigants).

may allege that the award rests on errors of fact or on misinterpretation of the contract." *Misco*, 484 U.S. at 36; *see also id.* at 37-38. Courts may set aside arbitral rulings "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 940, 942 (1995).

II. IN CONFORMITY WITH THESE PRINCIPLES, REVIEWING COURTS HAVE ONLY VERY RARELY VACATED ARBITRATORS' DECISIONS.

Despite all of the Petitioner's attempts to find inconsistency in discussion in the case law and the secondary literature, it is exceptionally rare that a reviewing court vacates the decision of an arbitrator under the Federal Arbitration Act. In fact, as the numerous opinions cited in MSW's Petition and additional research readily reveal, in only a handful of cases have commercial arbitration awards ultimately been vacated at the appellate level. *See, e.g., Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988); *Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195 (9th Cir. 1982). Standards such as the "essence of the contract" test and "manifest disregard" of the law do not betoken any substantive difference in the scope of the review provided but remain, in the words of one commentator, "theoretical construct[s]." [5] The fact is that the courts of appeals apply a narrow standard of judicial review entirely consistently.[6]

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[5] Stephen L. Hayford, *Law-in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 776 (1996).

[6] To illustrate, of the numerous cases cited by Petitioner, in only one was a commercial arbitration award on the merits ultimately vacated by a circuit court of appeals on the basis of "manifest disregard" of the law. *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997). As recently as 1996, one commentator noted that no commercial arbitration had even been vacated on the basis of "manifest disregard" of the law. Hayford, *supra*, at 776, 777; *see also* Brad A. Galbraith, Note, *Vacatur of Commercial*

III. REGARDLESS OF PRECISE TERMINOLOGY, COURTS OF APPEALS APPLY THE STANDARDS OF REVIEW DICTATED BY THE FEDERAL ARBITRATION ACT.

The Fifth Circuit and other courts have looked exclusively to the literal terms of the review provisions found in 9 U.S.C. § 10(a) in resolving motions to confirm or vacate arbitral awards. The statement of the Fifth Circuit in *Forsythe Int'l, S.A. v. Gibbs Oil Co.* is typical:

> judicial review of a commercial arbitration award is limited to Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Accordingly, a district court has no authority to vacate an arbitration award unless: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10(a)-(d).

915 F.2d 1017, 1020 (5th Cir. 1990) (citation omitted); *see also, e.g., Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990) ("[T]he Supreme Court has held that the grounds for vacating an arbitrator's award are limited to [the] . . . statutory categories [contained in 9 U.S.C. § 10].").[7] By their very terms, the four grounds set forth in the Federal Arbitration Act all relate to the conduct of the

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Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard, 27 IND. L. REV. 241, 252 (1993). Independent research by Respondent reveals no court of appeals decision other than *Montes* in the period from 1996 to 1998 in which a commercial arbitration award was vacated for "manifest disregard" of the law.

[7] *See also, e.g., R.M. Perez & Assocs. v. Welch*, 960 F.2d 534 (5th Cir. 1992); *Moseley, Hallgarten, Estabrook & Weeden v. Ellis*, 849 F.2d 264 (7th Cir. 1988); *LaFarge Conseils et Études, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334 (9th Cir. 1986).

arbitrator during the arbitral process, or to the rendering of an award which is outside the scope of the matter submitted to the arbitrator. They do not relate to the merits of arbitral determinations of fact or law, unless those determinations evidence misconduct on the part of the arbitral decision maker. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).[8]

In the Petition, MSW suggests that two formulations of the standard of review mentioned by some courts—"manifest disregard of the law" and the "essence test"—are distinct from the standard of review set forth in the Federal Arbitration Act and that they, accordingly, substantively supplement the Federal Arbitration Act.

First, as stressed above, however, the Petitioner does not and cannot point to any change in the outcome of a case based upon application of the "manifest disregard" standard. Moreover, that standard, even as a theoretical construct, does not express a standard of review any different from the statute. Although the Petition (at 4, 5 n.1) refers to the "manifest disregard" standard as "judicially created" and "non-statutory," several courts have found it to be based on 9 U.S.C. § 10(a)(4), which allows a court to overturn decisions of arbitrators that "exceed[] their powers."[9] This is consistent with this Court's dictum

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[8] As stated by the Fourth Circuit, "in reviewing arbitral awards, a district or appellate court is limited to determining 'whether the arbitrators did the job they were told to do not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union*, 973 F.2d 276, 281 (4th Cir. 1992) (internal quotation omitted)), *cert. denied*, 513 U.S. 1112 (1995).

[9] *See, e.g., Robbins v. Day*, 954 F.2d 679, 683 (11th Cir.), *cert. denied sub nom. Robbins v. PainWebber, Inc.*, 506 U.S. 870 (1992);

regarding "manifest disregard" in *Wilko*, the opinion to which the appellate courts have invariably pointed as the genesis of the manifest disregard of the law theory. This Court's discussion in *Wilko* commences, "Power to vacate an award is limited." Adjoined to this statement is a footnote which quotes 9 U.S.C. § 10 without further comment, and the immediately following remarks in the main text set forth the "manifest disregard" language. *Wilko*, 346 U.S. at 436-37 & 436 n.22.

The other basis for vacatur which Petitioner MSW asserted at the court of appeals is the so-called "essence test." [10] The essence test stems from several labor arbitration decisions of this Court, most notably *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363

Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc., 894 F.2d 862, 866 (6th Cir. 1990); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960); *see also Soler Chrysler-Plymouth*, 473 U.S. at 656 (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. § 10."). Several prominent commentators have also concluded that this test is an illustration of § 10(a), not an additional ground for vacatur independent of the FAA. Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 257-58 (1993) (illustration of § 10(a)(4)); Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, DISPUTE RESOLUTION J., Oct. 1996, at 22, 80-81 (most plausible reading of the *Wilko* dictum "is one whereby its oblique reference to 'manifest disregard' is viewed as identifying a type of arbitral misconduct or misbehavior of the nature addressed in § 10(a)(3) of the FAA which can trigger vacatur under that provision"). *Compare Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 n.5 (1st Cir. 1990), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (manifest disregard avenue of review is judicially-created and not derived from 9 U.S.C. § 10).

[10] This ground was not presented in Petitioner's district court Motion to Vacate the Arbitration Award (R. 485).

U.S. 593, 597 (1960). Of course those decisions are not precedent for commercial arbitration, which (unlike labor arbitration) is governed by the Federal Arbitration Act. As applied in the commercial arbitration context, the standard has been properly understood to be derived from 9 U.S.C. § 10(a)(4). *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir.), *cert. denied sub nom. Robbins v. PaineWebber, Inc.*, 506 U.S. 870 (1992); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130 n.11 (3d Cir. 1972); *see Kelley v. Michaels*, 59 F.3d 1050, 1053 (10th Cir. 1995); *Federated Dep't. Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988). Otherwise there is no warrant for its application.

In sum, there exist a number of shorthand terms of art that some courts employ to denominate the tests and standards they are applying in determining motions to vacate arbitral awards. But as Petitioner essentially concedes (Petition, at 5 n.1), there is no difference in the review standard set forth in these various formulations. Following an extensive discussion of the "various hues and colorations" of the formulations of the standard of judicial review of an arbitration, the First Circuit concluded that

> *the standard of review undergirding these various formulations* [*is*] *identical*, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice." *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988). *However nattily wrapped, the packages are fungible.*

Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990) (emphasis added).[11] Nor, as urged above, is there any

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[11] *See also Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1459 n.5 (11th Cir. 1997) (noting that each of the three rubrics

substantive difference in the review available under the Federal Arbitration Act and the review sought by Petitioner under the "tests" urged.

IV. THE ARBITRATOR'S AWARD IN THIS CASE WAS IN ANY EVENT PROPERLY CONFIRMED, BECAUSE IT WAS CORRECT UNDER ANY STANDARD.

The point urged by Petitioner is that it made a valid acceptance when presented the opportunity pursuant to the contractual right of first refusal contained in the Agreement. This contention is incorrect. The right of first refusal was expressly granted only to MSW, and it explicitly stated that it did not apply to MSW's individual partners. (R. 0430). Chevron accordingly requested a copy of the MSW partnership agreement, evidence of MSW's continuing existence, and evidence of Steinberg's authority. Even though Chevron extended the time on several occasions, ultimately the documents which were forwarded reinforced concerns about whether MSW continued to exist and about whether Steinberg possessed the requisite authority. (S.R. 0004-05). For example, MSW's Joint Venture Agreement required that Steinberg, as man-

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of review of arbitral awards there at issue "could conceivably be encompassed in the other"); *Jenkins v. Prudential Bache Sec., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988) (suggesting that the various principles for review of arbitration awards embody "a sort of 'abuse of discretion' standard"); *Service Employees Int'l Union, AFL-CIO, CLC v. Local 1199 N.E., SEIU, AFL-CIO, CLC*, 70 F.3d 647, 651 (1st Cir. 1995) (reiterating the principle of *Advest* that the different articulations of the standard of review of an arbitral award are "in essence 'identical'"); Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759, 762-63 ("The lower courts have developed numerous variations of the essence of the contract standard. These variations set aside an award if it is 'completely irrational,' 'unfounded in reason and fact,' 'arbitrary and capricious,' 'palpably faulty,' not 'plausible,' or in '[m]anifest disregard of the law.' Whatever label applied, the vast majority of disputed arbitration awards are affirmed under the essence of the contract standard." (footnotes omitted)).

ager of venture property, obtain *written authorization* for any action beyond those limited ministerial duties of the manager of venture property set forth therein. (S.R. 0005). On these facts, it cannot be suggested that the arbitrator disregarded the law in concluding that MSW did not properly exercise the right of first refusal and that Chevron's refusal to sell the property was justified.

CONCLUSION

For all of the reasons given above, the Petition should be denied.

Respectfully submitted,

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